FRONT LINE Report

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Forcible no-knock entry

Court ruling good news for police

The U.S. SUPREME Court ruled on March 4 that the Fourth Amendment does not hold officers to a higher standard when a "no-knock" entry results in property destruction.

In *U.S. v. Ramirez,* the Supreme Court held that no-knock entries are justified when officers have a "reasonable suspicion" that knocking and announcing their presence would be "dangerous or futile, or … inhibit their effective investigation of the crime." This standard applies regardless of how the no-knock entry is achieved.

Officers had obtained a no-knock warrant to enter and search the respondent's home and garage, which they believe housed an escaped felon and numerous firearms. They broke a garage window and pointed a gun through it hoping to dissuade the occupants from rushing to weapons.

Awakened and fearing a burglary, the respondent fired a pistol into the garage ceiling. After the officer shouted "police," the respondent surrendered.

The trial court had suppressed evidence found during the search, ruling that officers needed a "heightened

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NORTHEAST STOP: Pike County Deputy Sheriff Scott Burton, a D.A.R.E officer, visits with Attorney General Jay Nixon following dedication ceremonies at Northeast Correctional Center in Bowling Green.

Checkpoint stop ruled legal

THE STATE APPEALS COURT ruled in January that a stop made by officers was lawful since they had "reasonable suspicion" to investigate a motorist suspected of avoiding a checkpoint.

In *State v. Heyer*, a checkpoint was placed on an isolated highway exit.

The suspects saw a sign announcing the roadblock on the interstate and, as expected, took the exit ramp to avoid the checkpoint they believed was on the highway. However, they returned to the interstate when they saw the checkpoint at the top of the exit.

The car was stopped and 128 pounds of marijuana recovered.

The Eastern District court ruled the stop was lawful because the occupants' actions — turning onto the exit ramp and then returning to the interstate —gave officers "reasonable suspicion" under *Terry v. Ohio* to investigate.

This holding probably can be applied to other situations, such as a motorist who makes a U-turn to avoid a DWI checkpoint.

Officers should discuss this issue with their prosecutor.

In 1996, the Missouri Supreme Court upheld the constitutionality of drug checkpoints like the one used in the *Heyer* case.

U.S. Supreme Court prohibits same-sex harassment

THE U.S. SUPREME COURT unanimously ruled on March 4 that same-sex harassment can be sexual harassment and, therefore, unlawful.

In *Oncale v. Sundowner Offshore Services*, a male employee complained he was the object of repeated sexually oriented jokes and was physically assaulted in a sexual manner while working on an oil rig. While not claiming he was the target of homosexual advances, he nevertheless claimed the harassment was "because of sex."

The trial court had dismissed the suit, concluding federal law did not intend to protect against same-sex harassment.

The courts have struggled for years with whether federal laws prohibiting sexual harassment apply when the victim and harasser are of the same sex. This issue has arisen most often in cases of alleged homosexual advances. The question exists because sexual harassment is defined as unwanted and unreasonable harassment that occurs because of sex.

The U.S. Supreme Court reversed and reinstated the lawsuit, concluding that Congress intended "to strike at the entire spectrum of disparate treatment of men and women in employment." To be illegal, the conduct need not be motivated by "sexual desire" but must be "on the basis of sex."

The court noted that it was not trying to make all teasing or roughhousing illegal, and that courts and juries must use their common sense to distinguish between sexual harassment and crude behavior.

Thus, claims of sexual harassment no longer can be avoided by employees who only direct dirty jokes and sexual language to same-sex individuals. When such behavior becomes unwelcome and unwanted, it may create liability.

Cop killer set to die

The Missouri Supreme Court set an April 22 execution date for a man convicted of killing trooper **Russell Harper** during a traffic stop in 1987.

Harper had pulled over Glennon Paul Sweet's truck on a farm road along U.S. Highway 60 near Springfield when Sweet leapt from his truck firing an assault rifle at the trooper who was still in his car.

The AG's Office successfully opposed Sweet's petition to be heard by the U.S. Supreme Court.

AG's Office will help prosecute slayings

The AG's Office will provide special prosecutorial assistance to the Maries County prosecutor in a triple homicide near Vichy.

Prosecutor **Terry Schwartze** requested assistance from the office to prosecute two men charged with killing a woman and her two children.

HUD program offers affordable homes to officers

Attorney General **Jay Nixon** joined President Clinton in support of a pilot program that offers police officers and their families HUD-owned homes at half price and a $100 down payment.

The Officer Next Door program also encourages officers to live in communities in which they work and to make neighborhoods safer, Nixon said.

The Department of Housing and Urban Development is providing foreclosed homes throughout the country to officers who must live at least three years in them. Many of the homes are located in revitalized areas.

Officers may call HUD at 800-217-6970 to get more information. They also can call offices in St. Louis and Kansas City, Kan., to get a list of homes available in their communities.

To find homes in eastern Missouri, call HUD housing specialist Richard Herbst at 314-539-6541. For western Missouri, call specialist Victor Frederick at 913-551-5572.

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UPDATE: CASE LAW

MISSOURI SUPREME COURT

State v. Timothy S. Chaney
No. 79595
Mo.banc, March 24, 1998

The court found sufficient circumstantial evidence of the defendant's conviction of first-degree murder. While facts of the case supported two equally valid inferences, the court found that the "equally valid inference rule" was effectively abolished in *State v. Grim, 854 S.W2d 403, 414 (Mo.banc 1993).*

That rule, which appeared to be unique to Missouri, stated that "where two equally valid inferences can be drawn from the same evidence, the evidence does not establish guilt beyond a reasonable doubt."

In *Grim*, the court noted that the inferences rule conflicts with and renders meaningless the requirement that the appellate court presume that the trier of fact draw all reasonable inferences in favor of the verdict.

Because the inferences rule is at war with the due process standard governing an appellate court's review of sufficiency of evidence, the inferences rule no longer should be applied. Rather, the due process standard used in *State v. Grim* and *Jackson v. Virginia* should be applied.

The trial court did not commit plain error in allowing the state to elicit testimony about the defendant's prior bad acts during the penalty phase. The state called five witnesses who testified about the defendant's sexual and physical assault on his ex-wife and her minor sisters and illegal drug dealing and use. The acts occurred 10 to 26 years ago.

It is well established that prior unadjudicated criminal conduct may properly be heard by a jury during the penalty phase.

The court rejected the defendant's argument that the evidence should have been excluded because the acts were too remote. The jury decides remoteness.

In its proportionality review, the court concluded that the death sentence was disproportionate and ordered the defendant to be sentenced to life without eligibility for probation, parole or release. The court looked at the strength of the evidence, which was based primarily on trace and pathological evidence. Also, the defendant had no prior criminal convictions and there was evidence he was a good husband, friend and stepfather and he had a good reputation among business associates.

James Boersig v. Missouri Department of Corrections
No. 79886
Mo.banc, Dec. 23, 1997

In Section 558.019, which requires defendants to serve 80 percent of their sentences, the term "previous remand to the Department of Corrections" means sending a person back to Corrections.

Following the first commitment, each new trip back to Corrections is a remand. Therefore, the first remand to Corrections does not count when computing the 80 percent rule and the "previous remand" occurs with the third commitment. Thus, the 80 percent rule will apply on the **fifth commitment** to Corrections.

State v. James Henry Hampton
No. 79354
Mo.banc, Dec. 23, 1997

The court did not err in denying the appellant's motion to represent himself at trial in this capital case. The court construed the request as both an equivocal request and an actual request to serve as co-counsel. Because of the unclear request, the court denied the motion. The constitution says a request to proceed pro se must be unequivocal.

Court affirms cop's firing; wife had plotted

THE FEDERAL COURT of Appeals recently upheld the firing of a Missouri police officer whose wife's actions got him into trouble.

The officer's wife and daughter were talking on a cordless phone in 1994 when the wife indicated she wanted to set up the police chief by hiring someone to bribe him. The conversation was overheard and recorded by a private investigator, who then gave the tape to the mayor.

The officer sued after the city fired him over his wife's actions.

In *Singleton v. Cecil, 133 F.3d 631 (8th Cir. 1998)*, the officer claimed the firing violated his privacy rights to marriage and his First Amendment rights of "intimate association."

The court denied the claims, finding that the city's purpose was not to interfere with the officer's marriage, but was based on a good-faith belief that the officer conspired with his wife to engage in improper conduct.

Legislation will be reported

The next issue of **Front Line** will be published in late May with a summary of criminal legislation passed by the Missouri Legislature.

Several measures are advancing through the legislature, including those that address the meth problem, make changes in the death penalty, and keep dangerous sex offenders in civil commitment even after they have completed their prison term. These measures have substantial support.

UPDATE: CASE LAW

WESTERN DISTRICT

State v. Michael Werneke
No. 53295
Mo.App., W.D., Dec 23, 1997

The court rejected the defendant's argument that the trial court erred in admitting a 7-year-old victim's hearsay statements under Section 491.075. The defendant claimed the child's testimony was so inconsistent with itself and with her pretrial statements that it negated the reliability of pretrial statements and rendered them inadmissible. The trial court had held a hearing under Section 491.075 and found her statements to be reliable.

At trial, a doctor testified that her behavioral indicators and physical findings were consistent with the acts described by the victim and that she first testified at trial that the defendant had performed the act. After completing initial testimony, she was recalled and affirmed the defendant committed the act, but she could no longer remember where he had touched her.

At this time, out-of-court statements were admitted to prove the victim had told witnesses specific elements of the crime. The courts realize it is common for a youngster's testimony to contain variations and contradictions.

Inconsistent or contradictory statements made by a youngster about a sexual experience does not deprive the testimony of all probative force. Even if the court believed the victim's partial recanting of trial testimony so undermined her credibility that the court should not have submitted the count, there was no prejudicial error because the court later declared a mistrial on that count.

The trial court did not abuse its discretion in overruling the defendant's motion to disqualify the prosecutor, who allegedly became a necessary witness because of his conversation with the victim after her initial testimony. The defense counsel made no showing that the prosecutor's testimony was needed.

Two other persons were present when the prosecutor interviewed the victim after her initial testimony. The defense counsel voir dired the two witnesses, but the prosecutor did not call them at trial or show why the testimony would have been inadequate.

There was no reason to disqualify the prosecutor so he could testify.

State v. Barbara Peoples
No. 52691
Mo.App., W.D., Feb. 24, 1998

The court reversed the defendant's conviction of six counts of neglect of a nursing home resident under Section 198.070.11. The defendant was the nursing director at Latham Care Center in California, Mo.

Evidence showed that the director was told the victim had vomited 17 times the last 42 hours of his life and that the director was apprised of this condition at least six times.

The state submitted solely on the theory that the defendant's conduct created "a substantial probability that death or serious physical injury would result." It chose not to submit that the conduct presented "an imminent danger to the health, safety or welfare of the resident."

The state failed to prove the defendant knowingly failed to provide services necessary to maintain the victim's health and such failure created "a substantial probability that death or physical harm would result."

At most, state evidence proved the director was negligent and her actions constituted malpractice. Without expert testimony that the defendant's failure to notify a doctor of the victim's condition presented a probability of serious physical harm or death, there was no evidence from which the jury could make that finding.

State v. Kerry Lee Collins
No. 54017
Mo.App., W.D., Feb. 17, 1998

Evidence showed that the defendant stole a baseball bat and cap from cars belonging to the victim's neighbors. He then entered the victim's home, hit her on the head with the bat and raped her.

The circuit court did not commit plain error in admitting testimony about the bat and cap. Testimony about the bat's source was relevant to establish the defendant's intent and to show his planning for the burglary and assault.

Because the bat was used as the weapon, it was proper to show how the defendant got it. The fact that he stole the bat and carried it into the victim's house also was relevant to show his intent and state of mind.

State v. Doyle N. Johnson
No. 53771
Mo.App., W.D., Feb. 24, 1998

The court affirmed the defendant's conviction of unlawful use of a weapon and rejected his restricted definition of "exhibit" that visual contact must be made with a weapon to convict.

Evidence sufficiently proved that the defendant "exhibited" a gun under Section 571.030.1(4). The term "exhibit" is not defined by Section 571.030 and has not been interpreted by caselaw.

Two witnesses noticed a bulge in the defendant's shirt, which they believed was a gun. Although they did not actually see the gun, they watched the defendant shoot toward a car, saw "fire" and heard gunshots coming from where he was standing. Another witness also heard gunshots and saw "fire" coming from the defendant's hand.

The reasonable inference from the "fire" is that it was a visible sign and evidence of a gun being fired. The gunshots also was evidence that the defendant had a gun.

UPDATE: CASE LAW

EASTERN DISTRICT

State v. Herbert Bowens
No. 71629
Mo.App., E.D., March 3, 1998

The court affirmed the defendant's conviction of two counts of rape, one count of kidnapping and one count of creating a grave and unjustifiable risk of HIV infection, Section 191.677(2).

Under the 1994 version of that statute, the state properly proved the defendant created "a grave and unjustifiable risk" of infecting the victim with HIV. Statistical evidence about the risk of infection was unnecessary.

Medical evidence showed that the rape caused bleeding in the vaginal area and that sperm was found in vaginal fluid. Therefore, reasonable jurors could have determined that the "risk" of HIV infection, which the defendant conceded existed, was "grave."

If the legislature intended the word "grave" to encompass the word "substantial," a jury still could have found a risk existed without medical testimony. (Note: The statute, amended in 1997, now prohibits a person from acting "in a reckless manner by exposing another person to HIV without the knowledge and consent of that person …")

The trial court did not err in sustaining the state's motion in limine and refusing to let the defense present evidence that the victim tested HIV negative. Evidence that the victim was HIV negative may or may not have been logically relevant to the defendant's misidentification defense.

The defendant did not properly preserve the point for appellate review since he did not provide a specific offer of proof to show how this would have been legally and logically relevant.

The trial court did not err in excluding the defendant from the courtroom when the jury returned its verdict. The defendant refused to come out of his cell before instructions were read to the jury. When the judge ordered the defendant to be removed from the cell, the defendant intimidated officers with his threat of HIV infection.

It was within the judge's discretion to start without the defendant to maintain order in the courtroom.

SOUTHERN DISTRICT

State v. Robert Glenn Shelbourn
No. 21410
Mo.App., S.D., Dec. 16, 1997

The trial court did not abuse its discretion in allowing a police sergeant to testify that the defendant refused to take a breathalyzer test a second time. Section 577.041.1, which makes evidence of a refusal admissible, does not limit evidence of refusal to one denial.

State v. Scott Girdley
Nos. 21495 & 21496
Mo.App., S.D., Dec. 17, 1997

There was sufficient evidence of the defendant's guilt of DWI when he was found asleep on the driver's side of a vehicle that had run off the road.

The court rejected the defendant's argument that there was no evidence he was "operating" the vehicle and that the corpus delicti had not been established.

The responding trooper woke up the defendant who had slurred speech and admitted he had driven on back roads because he thought he was under the influence. He also vomited but refused to take a breathalyzer test. This evidence proved the defendant was intoxicated at the time of the accident, allowing his statements and evidence to be introduced.

The court, however, found that the trial court erroneously found him guilty of DWI as a class D felony. The state failed to prove that his two municipal court convictions of DWI were heard before a judge who was a lawyer and that the defendant was represented by a lawyer or waived in writing his right to counsel as required by Section 577.023.1(1).

Since the defendant was improperly sentenced as a persistent offender, the appellate court vacated the sentence and remanded it for resentencing.

Elizabeth Ziegler, executive director of the Missouri Office of Prosecution Services, prepares the Case Law summaries for Front Line.

Child abuse seminar May 28-29

An "Investigation and Prosecution of Child Abuse" conference will be held May 28-29 at the Lake of the Ozarks for the law enforcement community.

Sponsored by the Highway Patrol and Missouri Office of Prosecution Services, the conference is POST-accredited for nine hours of legal credit.

To register, call Bev Case at MOPS by May 15. Her number is 573-751-0619. The registration fee is $30.

Speakers from the National Center for Prosecution of Child Abuse will make presentations.

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NO-KNOCK ENTRY

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standard" of exigent circumstances to make forcible no-knock entries.

The Supreme Court held that if the manner of entry is reasonable under the circumstances, no greater exigency is necessary to justify a lawful no-knock entry that requires a door or window to be broken.

However, *Ramirez* does not expand the circumstances in which officers can execute no-knock search warrants. And the circumstances in which no-knock entries are permitted are the exception. The case simply tells officers that the permissibility of a no-knock entry does not depend on the means of entry used, as long as the means of entry is not unreasonable or excessive.

This is the Supreme Court's third ruling issued in as many years on the legality of no-knock rules.

In a 1995 ruling, *Wilson v. Arkansas,* the court also held that no-knock entries are justified when officers have a reasonable suspicion that knocking would "be dangerous or futile" or would "inhibit the effective investigation of crime."

In the 1997 ruling in *Richards v. Wisconsin,* however, the Supreme Court held that there is no "automatic" right to a no-knock warrant every time police are searching for drugs. There has to be reasonable suspicion that the drug trying to be seized will be destroyed if officers knock and announce their presence.

Wanted: Special prosecutor

THE AG's OFFICE has an immediate opening for a special prosecutor. Capital litigation experience is preferred but not essential.

An investigator will be assigned to the special prosecutor to assist in prosecuting a broad range of criminal prosecutions throughout the state.

Contact Deputy Attorney General **Jim Layton,** P.O. Box 899, Jefferson City, MO 65102.